IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

02-16944

KULVIR SINGH BARAPIND,

Petitioner-Appellant,

v.

JERRY J. ENOMOTO,
UNITED STATES MARSHAL FOR THE EASTERN DISTRICT OF CA,

Respondent-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA
(CV-F-01-6215-OWW/SMS)

PETITION FOR REHEARING EN BANC

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INTRODUCTORY STATEMENT BY COUNSEL

Pursuant to Federal Rule of Appellate Procedure 35, petitioner Kulvir Singh Barapind hereby seeks rehearing *en banc* of the panel decision in *Barapind v. Enomoto*, 360 F.3d 1061 (9th Cir. 2004), that he is extraditable to India. The panel's unprecedented lowering of the standards for establishing probable cause in extradition proceedings presents an issue of exceptional importance and conflicts with this Circuit's law that hearsay statements must have an indicia of reliability to satisfy probable cause. *See Zanazanian v. United States*, 729 F.2d 624, 627 (9th Cir. 1984). Therefore it warrants *en banc* rehearing. *See* Fed. R. App. P. 35(a)(2). Of no less importance is the panel's rejection of the American incidence test for applying the political offense exception to extradition, established by the Supreme Court in *Ornelas v. Ruiz*, 161 U.S. 502 (1896), and affirmed in *Quinn v. Robinson*, 783 F.2d 776 (9th Cir. 1984). The panel decision thus creates a conflict in the application of the political offense that also requires *en banc* rehearing. *See* Fed. R. App. P. 35(a)(1).

The panel departs from the Circuit precedent that to establish probable cause based on hearsay statements, the statements must have an indicia of reliability. *See Zanazanian*, 729 F.2d at 627 (9th Cir. 1984). Here the extradition magistrate below found that the Indian government's hearsay

statements lack any indicia of reliability because during the relevant time, the Indian government engaged in a pattern and practice of torturing and coercing witnesses to obtain such statements against Sikh separatists. *See In re Extradition of Singh*, 170 F. Supp. 2d 982, 1021-1029. Moreover the extradition court specifically found that the Indian government had engaged in such chilling conduct to fabricate evidence against Mr. Barapind. *See Barapind*, 360 F.3d at 1068-1069. Remarkably, the panel held that such statements, nevertheless, may establish probable cause even where the government's witnesses on whose behalf they presented the statements submitted properly authenticated and executed sworn affidavits that the attributions to them were fabricated. *See id.* at 1069. The panel accomplished this unpalatable result by condoning the extradition court's consideration of the prevailing context of this case in examining certain hearsay statements, while at the same time ignoring the context when evaluating other indistinguishable hearsay statements. *See id.* at 1073. The extradition magistrate's arbitrary, inconsistent treatment of the statements, however, conflicts with *Cornejo-Barretto v. Seifert*, 218 F.3d 1004 (9th Cir. 2000), and *Mainero v. Gregg*, 164 F.3d 1199 (9th Cir. 1999). Contrary to the extradition magistrate's approach and the panel's affirmance, *Cornejo-*

Barretto and *Mainero* endorsed the even treatment of evidence that was similarly tainted.

The panel's overlooking the dearth of reliability and its affirming of the selective disregard of the totality of circumstances has effectively rendered the probable cause standard "toothless" in the context of extradition proceedings. *See United States v. Kin-Hong*, 110 F.3d 103, 121 (1st Cir. 1997). Such departure from precedent requires rehearing *en banc*. *See* Fed. R. App. P. 35(a)(1).

Additionally, the panel's decision discards the American incidence test in applying the political exception set forth by the Supreme Court in *Ornelas v. Ruiz*, 161 U.S. 502 (1896), and affirmed by this Court in *Quinn*, 783 F.2d 776 (9th Cir. 1984). The panel cloaked its decision in the standard of review by vesting the determination in the extradition magistrate's discretion, even though in earlier in its decision it correctly recited the standard of review as *de novo*. *Barapind v. Enomoto*, 363 F.3d at 1073-74. Thus, in its application to one offense, according to the panel decision, even if a relator satisfies all of the *Ornelas* factors triggering the political offense exception to extradition, he still may be denied the protection in the discretion of the magistrate. *See Barapind*, 360 F.3d at 1075-1076. In its application to a second offense, the panel concluded that

even when an offense is established as political, if a civilian is murdered during the course of it, a relator, irrespective of his alleged conduct, is automatically stripped of the exception's protection. With respect to this offense, the government's own evidence, if reliable, establishes that: Mr. Barapind was not present and did not participate in the killing of the civilian; he was never was part of any conspiracy to target or in any way harm civilians; and his words and actions during the course of the offense indicated that he was interested only in counterinsurgents. *See id.* at 1076. The panel's failure to weigh all the *Ornelas* factors amounted to a reformulation of the political offense exception to extradition and creates a conflict with precedent that makes rehearing under FRAP 35(a)(1) appropriate. *See Ornelas*, 161 U.S. at 692(Civilian status of victim one factor, but not only factor in application of political offense exception.)

STATEMENT OF ISSUES PRESENTED FOR REHEARING

The underlying extradition proceedings were instituted on September 18, 1997 by the Government of India pursuant to the Treaty for the Mutual Extradition of Criminals between the United States of America and Great Britain ("Treaty"), Dec. 22, 1931, U.S.-Gr. Brit., TS. No 849 (1932). Mr. Barapind now seeks rehearing of the panel decision that probable cause exists to support the certification of his extradition for three

offenses, and that his extradition was not barred for these offenses under the political offense exception.

A. PROBABLE CAUSE ISSUES

1. After there has been a finding that the requesting government has tortured and coerced witnesses to fabricate statements against the relator, whether a requesting government may satisfy probable cause based solely on a document that: a) it presents as a translation of an eyewitness statement that is not signed or dated; and, b) without explanation, is not accompanied either by a copy of the foreign language original or a certification of a translation?

2. Whether an extradition magistrate is required to evenly apply the context of the proceedings in evaluating probable cause in the "totality of the circumstances," namely that the requesting government engaged in gross human rights violations against the purported eyewitnesses to fabricate evidence against the relator?

3. Whether a sworn, uncontroverted affidavit from an eyewitness of an alleged offense stating that the relator was not one of the perpetrators obliterates a document that states that the same eyewitness did implicate the relator, in light of the fact:

    a. without explanation, the requesting government's document is not accompanied by a certified translation or a copy of the foreign language original that is stated to be available in a court file; and

    b. there is conclusive evidence in the record that the Government of India, and the preparer of the report, engaged in torture and fabrication to collect statements against the relator.

4. Whether there is evidence to support probable cause of a murder if the allegations establish that the conspiracy was to target the counterinsurgent husband of the victim, and not the

victim, and it is unrebutted that the relator did not participate or intend the murder of the victim, and was not present when it occurred?

B. POLITICAL OFFENSE EXCEPTION TO EXTRADITION

1. Whether it is in the discretion of the extradition magistrate to deny a relator protection from extradition under the political offense exception when he establishes that the character of the foray, the mode of attack, the persons killed and the kind of property taken and destroyed all supported the conclusion that the attack was committed by militant separatists against the Indian government?

2. Whether the alleged murder of a civilian in the course of a deemed political offense may automatically strip a relator of the exception's protection from extradition, even though, accepting the allegations as true, the relator was not present during the murder and all of his actions were intended and directed at combatants, not at civilians?

ARGUMENT

A. THE PANEL'S DECISION AFFIRMING THE EXTRADITION COURT'S FINDING OF PROBABLE CAUSE IS BASED ON A STANDARD OF PROOF SO LOW THAT IT IS INCOGNIZABLE AND DISPENSES WITH ANY RULE OF LAW IN FAVOR OF UNENCUMBERED ARBITRARINESS.

1. APPLICABLE LEGAL FRAMEWORK & STANDARD OF REVIEW

Under Article IX of the Treaty, "the extradition shall take place only if the evidence be found sufficient ... to justify the committal of the prisoner for trial." Accordingly, the requesting government must establish

probable cause as would be required by United States courts in federal criminal preliminary hearings, and as a result, is required to weight the evidence in the "totality of the circumstances." *See Charlton v. Kelly*, 229 U.S. 447, 461 (1913); *see Illinois v. Gates*, 462 U.S. 212 (1983)(Probable cause must be evaluated in the totality of the circumstances.) "Probable cause [is] a case made out by proof of furnishing good reason to believe by the person charged with having committed it." *Ornelas v. Ruiz*, 161 U.S. at 512 (*quoting* 1 Burr's Trial, 11).

A relator may challenge a showing of probable cause with evidence that explains away or completely obliterates the requesting government's evidence. *See Charlton v. Kelly*, 229 U.S. at 457-58. If the relator obliterates the requesting country's showing of probable cause by "negating" it, then extradition should be denied because the requesting government's did not meet its burden of proof. *See Matter of Sindona*, 461 F.Supp. 672, 685 (S.D.N.Y. 1978), *petition for writ of habeas corpus dismissed*, 461 F.Supp. 199 (S.D.N.Y. 1978), *affirmed*, *Sidnoa v. Grant*, 619 F.2d 167 (2nd Cir. 1980).

This Court reviews the extradition court's probable cause findings, "by somewhat liberal extension, whether there was any evidence warranting the finding that there were reasonable grounds to believe the

accused was guilty." *Mainero v. Gregg*, 164 F.3d at 1205 (*quoting Quinn*, 783 F.2d at 790.)

2. ONCE IT WAS ESTABLISHED THAT THE GOVERNMENT OF INDIA FABRICATED WITNESS STATEMENTS AGAINST MR. BARPIND UNDER THE GOVERNING LAW, INDIA COULD NOT ESTABLISH PROBABLE CAUSE BASED ON A SINGLE DOCUMENT IT ULTIMATELY PRESENTED AS A TRANSLATION OF SUCH A TAINTED STATEMENT, WITHOUT A COPY OF THE FOREIGN LANGUAGE ORIGINAL OR A CERTIFICATE OF TRANSLATION, WHICH THE PANEL WRONGLY FOUND WAS PRESENT.

Implicitly understood but never expressly stated by the panel is the fact that in the offenses at issue, the Indian government's showing of probable cause rested on a purported affidavit by an eyewitness, or, as in F.I.R. No. 34, a purported affidavit by a police officer summarizing a statement by an eyewitness. *In re Extradition of Singh*, 170 F.Supp.2d at 1013-16. The Indian government's showing of probable cause stands or falls on the probative value accorded to these statements that were saturated with unreliability never before seen by this Court.

> [The] ... Indian police and their agents resorted to torture, coercion, abuse of process, and extrajudicial detentions to obtain evidence against militant Sikhs in order to suppress their movement. The court accepted this evidence as competent. India ... put forth minimal effort to refute this evidence, and has not challenged the district court's adverse findings and conclusions.

Barapind, 360 F.3d at 1067. The torture and coercion of witnesses was not merely a backdrop. The Indian government had engaged in such conduct in collecting statements against Mr. Barapind. "Except in crimes in which the eye-witnesses were employed by the Indian government or were opposed to the Khalistan movement ..., in all but one case, sworn recantations are offered affirmatively stated that the witness did not make the purported identification of Barapind ... The remaining charge ... is based on the allegedly coerced confession of Tarlochan Singh, who died after torture by Indian police." *In re Extradition of Singh*, 170 F.Supp.2d at 1019.

These purported "affidavits" are in English and are neither signed nor dated. *See Id.* In 1995, a year after the filing of these documents with the United States Department of State, the Indian government recharacterized them as translations of Punjabi originals, and announced that the originals were available in court files in Punjab's Jalandhar District. The averment identified a "sworn affidavit attesting to the veracity of the translation." *See Id.* Inexplicably no such "sworn affidavit attesting to the veracity of the translation" accompanied the purported affidavits. *See Id.*

The panel embraced this misrepresentation by wrongly believing a certificate of translation existed. *Barapind*, 360 F.3d at 1068 ("These statements were summarized by Satish Kumar Sharma and

accompanied by a sworn statement attesting to veracity of the English translation."). In the absence of a copy of the foreign language original, the lack of the certified translation and panel's oversight is not inconsequential. In *Oen Yin-Choy v. Robinson*, 858 F.2d 1400 (9th Cir. 1988), this Court excused the absence of the original foreign language documents when the documents offered as English translations of witness statements were accompanied by a certificate of translation. *Id.* at 1405. In this case, the purported witness statements are without a certified translation or a copy of the foreign language original, and thus constitute nothing more than typed English documents titled affidavits, with no signature or date.

The Indian government's evidence was on its face more tenuous than any other this Court has reviewed in the extradition context. *See id.*; *see also Sakaguchi v. Kaulukukui*, 520 F.2d 726 (9th Cir. 1975) (Reliability established by overwhelming hearsay evidence established probable cause); *Zanazanian v. United States*, 729 F.2d 624 (9th Cir. 1984)(Reliability established by multiple police reports detailing accomplices confessions established probable cause); *Emami v. U.S. Dist. Court*, 8345 F.2d 1444 (9th Cir. 1987)(Reliability established by sworn affidavit by prosecutor containing fifty-two pages of summaries of witness statements established probable cause). Given the disquieting general

practices of the Indian government and those exhibited in this case, its evidence was not entitled to the "daunting" deference afforded by the pancl. *See Barapind*, 360 F.3d at 1072.

The Indian government during the course of the extradition proceedings, in fact only managed to cement the fate of its evidence in 1998 by eliminating any doubt that the originals of the purported affidavits do not exist. In 1998, for some of the cases, but not all, the Indian government produced a second round of English documents purported to be witness statements confirming their initial identifications of Mr. Barapind as the perpetrator of the offense in question. *In re Extradition of Singh*, 170 F. Supp. 2d at 1015(Explaining 1998 submission). These documents were accompanied by a certificate of translation, but contained an original signature belying the representation that the documents were translations of Punjabi originals. *See id.* More importantly it highlighted the problem with the government of India's evidence. In response to substantiated allegations of fabrication of evidence, the Indian government offered a second round of eyewitness statements procured five and one-half to seven years after the offense. It did so in lieu of producing the foreign language originals of the eyewitness statements in its first submission that were stated to be readily available in court files. By not producing even copies of the original foreign

language statements that it stated were present in court files and instead opting to engage in the exceedingly more onerous and less probative exercise of collecting a second round of witness statements, the Indian government confirmed that the originals of the purported eyewitness do not exist.

The Indian government's hearsay statements thus were a wasteland of unreliability that under this Court's precedent could not establish probable cause. *See Zanazainian v. United States*, *id* .

3. THE EXTRADITION MAGISTRATE'S FINDING THAT MR. BARAPIND'S EVIDENCE DID NOT OBLITERATE THE GOVERNMENT'S SHOWING IN F.I.R. 34 & 100 WAS INCONSISTENT WITH *CARNEJO-BARETTO* & *MAINERO*.

a. F.I.R. 100: The sworn affidavits of both of the government's own witnesses that stated that Mr. Barapind was not one of the perpetrators and that they never stated he was served to obliterate whatever probative value the Indian government's evidence could be afforded.

F.I.R. 100 involved a remarkable conte that replayed itself, with some variation, throughout these proceedings. F.I.R. 100 concerned an assault rifle attack on Sahib Singh and Makhan Ram by two men on a scooter that occurred on October 26, 1991. *In re Extradition of Singh*, 170 F.Supp.2d at 1004. The gunshots killed Sahib Singh and injured Makhan

Ram. *Id.* The Indian government rested its probable cause showing on purported statements from the victim and eyewitness, Makhan Ram. *Id.*

Mr. Barapind countered with a sworn affidavit from Makhan Ram that attested that the statement accorded to him by the Indian government was a fabrication, and that Mr. Barapind was not a perpetrator of the alleged offense. *Id.* at 1024-25. Specifically, Makhan Ram explained that he could not identify the perpetrators at the time of attack, and, as result, he never identified the perpetrators to the police. *Id.* He further explained that while he was in police custody in September of 1997 pursuant to criminal charges "relating to poppies, from which [he] was exonerated," the government security forces coerced him into singing two blank sheets of paper. *Id.* When in January 2001 he reviewed the copies of the statements submitted by the government of India on his behalf, he aptly described them as "fabrications." *Id.*

Makhan Ram's sworn statement proffered by Mr. Barapind was in his native language, signed and dated. *Id.* at 1018. It was accompanied with a certified translation. *Id.* Furthermore it was duly executed and authenticated before an Indian attorney, Navkiran Singh, who testified at the extradition hearing. The extradition magistrate expressly found Mr. Singh

credible. *Id.*; *see also id.* at 989, 1029 (Crediting Navkiran's testimony regarding tactics employed by Indian security forces.)

As indicated above, Mr. Barapind provided such a sworn statement on behalf of every witness who was not in the employ or an agent of the Indian government. *Id.* at 1019. The statement presented in F.I.R. 87 mirrors Makhan Ram's sworn affidavit submitted by Mr. Barapind. Rattan Singh is the eyewitness in F.I.R. 87. *Id.* at 1022-23. The Indian government presented statements attributed to him that Mr. Barapind was a perpetrator in the murder of three men in a jeep in which Rattan Singh was traveling. *Id.* Mr. Barapind, in turn, provided a sworn affidavit on behalf of Rattan Singh that stated that he never identified Mr. Barapind as a perpetrator. *Id.* Rattan Singh further stated that the government security forces took him into their custody and coerced him to place his thumbprint on blank papers. *Id.* When he was shown copies of the statements filed by the government of India in its extradition request, he described the affidavits as "product of the police misuse of my forcibly impose[d] thumbprint." *Id.*

The extradition magistrate aptly concluded that:

> Barapind has submitted unrebutted evidence that the Indian police and their agents sometimes used false identifications, false encounter killings, extra-judicial detentions, torture, and coercive methods in their efforts to suppress militant Sikh separatists. It is unlikely that Rattan Singh would expose himself to the risks of criminal prosecution and reprisal by the

> police in his country, India, by giving a "false" affidavit in 2001, declaring he never identified Barapind or anybody else, because he could not do so, much less, "falsely state" he was forced under threat of death to provide his thumb print for the Barapind identifications, knowing his 2001 affidavit would be provided to the Indian government. Rattan has a bias against India because he has suffered at the hands of the police. On the totality of the circumstances, the January 13, 2001, affidavit of Rattan Singh is credible. It destroys the competence of the evidence and obliterates probable case for F.I.R. 87.
>
> India had the opportunity to challenge the explanatory (of the circumstances of taking the 1998 identification from Rattan Singh) and his obliterating 2001 affidavit. It chose not to do so. The consequences of this election is a failure of proof on the issue of credibility and the competence of the evidence underlying F.I.R. 87.

In re Extradition of Singh, 170 F.Supp.2d at 1023. The extradition magistrate, nonetheless, did not reach the same conclusion in F.I.R. 100, even though its facts mirrored those in F.I.R. 87. The backdrop of human rights abuses, the competing influences on the eyewitness, and the absence of an explanation from the Indian government were equally present in F.I.R. 100.

F.I.R. 100, if anything, presented a stronger case for obliteration because Makhan Ram was a victim, and a second witness, alluded to in the Indian government's submission, corroborated his account that the government security forces fabricated witness statements to implicate Mr. Barapind in F.I.R. 87. *See id.* at 1024-1025.

The extradition magistrate never explained his disparate treatment of F.I.R.'s 87 and 100. *Barapind*, 360 F.3d at 1072. The arbitrariness does not warrant deference. *See United States v. Leon*, 468 U.S. 897, 914-917 (1984)(Reviewing court should not afford magistrate boundless deference but instead must insure that magistrate analyzed probable cause in totality of the circumstances.)

b. F.I.R. 34: Mr. Barapind provided the only sworn affidavit from the government's purported eyewitness to this offense, who explained that Mr. Barapind was not a perpetrator of this offense and that he never stated that Mr. Barapind was.

F.I.R. 34 only differs from these other offenses because the Indian government's initial showing of probable cause is thinner. F.I.R. 34 involves an April 26, 1992 attack by militant separatists on a former government legislative assembly, a government official, and two police constables assigned to guard them. *Id.* at 1010-1011. Nirmal Singh, an eyewitness to the incident, spoke to police investigators following the offense. *Id.* at 1027-28. In support of its extradition request the government of India submitted an "affidavit" attributed to Indian policeman Surinder Pal that states that Nirmal Singh identified Mr. Barapind as one of the militant separatists. *Id.* Unlike the other cases, there is no "affidavit" attributed to the eyewitness proffered by the government; nor is there any purported

identification of Mr. Barapind, either in the original submission or the 1998 retrodiction. *Id.* Mr. Barapind submitted the only sworn statement in the record on behalf of the eyewitness Nirmal Singh. Nirmal Singh states in his sworn statement that although he was an eyewitness to the incident, contrary to Surinder Pal's "affidavit," he did not identify any of the perpetrators to the police. *Id.* Nirmal Singh, after reviewing Surinder Pal's affidavit, accuses Surinder Pal of listing the name of Mr. Barapind and the others on his own accord. *Id.*

It is unthinkable, given the gap of reliability between the conflicting statements and the acknowledged context of this case, that even assuming the Indian government ever mustered probable cause, it survived Nirmal Singh's sworn statement that Mr. Barapind was not one of the perpetrators of the offense. *See United States v. Kin-Hong*, 110 F.2d 103, 120-21 (1st Cir. 1997)(Extradition court required to weigh reliability and evidence of coercion destroys witness statement's probative value); *see also In re Extradition of Contreras*, 800 F. Supp. 1462 (S.D. Tex. 1992); *United States v. Linson*, 88 F.Supp.2d 1123 (D. Guam 2000); *In re Extradition of Strunk*, 293 F.Supp.2d 1117 (E.D. Cal. 2003)(Same); *Maguna-Celaya v. Haro*, 19 F.Supp.2d 1337 (S.D. Fla. 1998) *overruled on other grounds*, 172

F.3d 883 (11th Cir. 1999); *Sandhu v. Burke*, 2000 WL 1919707 (S.D.N.Y. 2000).

Like in F.I.R. 100, the extradition magistrate again, ignored the issues of relative reliability and the context. As a result he concluded that India's meager showing of probable cause was not obliterated by an unrebutted, unassailably credible sworn statement by the only witness to the offense, who stated that he did not identify Mr. Barapind but upon whose identification the government relied upon. *See id.* Because the extradition court's decision was based on arbitrarily removing F.I.R. 34 from the context of these proceedings, the panel erred by affirming the decision. *See id.*

c. The core of the extradition magistrate's arbitrary probable cause findings is his uneven consideration of the alarming context of these proceedings that directly contravenes with the approach approved in *Cornejo-Barretto & Mainero.*

The evidence of torture and coercion of witnesses and fabrication of evidence in these proceedings was not merely tangential. The extradition magistrate concluded that these very tactics were employed by the Indian government's security forces in collecting the purported witness statements it called "affidavits" in these proceedings. *Barapind*, 360 F.3d at 1073.

The extradition magistrate analyzed probable cause in F.I.R. 87 and F.I.R. 220 in the context of the Indian government's tactics. With regard to F.I.R. 87, where the "affidavit" of Rattan Singh was in question, the extradition magistrate considered: "Barapind has submitted unrebutted evidence that the Indian police and their agents sometimes used false identifications, false encounter killings, extra-judicial detentions, torture, and coercive methods in their efforts to suppress militant Sikh separatists." *In re Extradition of Singh*, 170 F.Supp.2d at 1023. With regard to F.I.R. 220, where a police report of Tarlochan Singh's "confession" preceding his death in police custody was at issue, the extradition magistrate considered: "Testimonial evidence was received in open court from Simranjit Singh Mann and Navkiran Singh, that torture, reprisal police killings of insurgents in 'false encounters,' and anti-terrorist tactics that included extra-judicial detentions without cause, which violated fundamental civil liberties (prolonged and unjustified incarceration), were regularly practiced by Indian security forces and local police in Punjab." *Id.* at 1029. Not surprisingly, the extradition magistrate found that the government of India failed to establish probable cause for these offenses. *Barapind*, 360 F.3d at 1073.

Yet the extradition magistrate reached the contrary finding for the offenses he found certifiable, because he, without explanation, did not

evaluate the identical hearsay statements in the applicable prevailing context. The extradition magistrate's arbitrary, unequal treatment of identical evidence diverges with the approach approved in *Carnejo-Barretto v. Seifert*, 218 F.3d 1004 (9th Cir. 2000), and *Mainero v. Gregg*, 164 F.3d 1199 (9th Cir. 1999)

In *Cornejo-Barretto* and *Mainero* this Court sensibly approved treating identical evidence identically. In *Cornejo-Barretto*, where the trial courts concluded that the allegations of torture were substantiated, "To isolate any taint the alleged torture could have on the evidence supporting the probable cause determination, the judge considered the sufficiency of evidence *without the challenged confessions*. He concluded that there was probable that the relator committed the crimes charged in the extradition papers, even if the challenged evidence was excluded." *Cornejo-Barretto*, 218 F.3d at 1008(Emphasis supplied). In *Mainero*, this Court first affirmed the lower courts' finding that the allegations of torture were not supported by the record, and that, nevertheless, there was "ample evidence of probable cause *independent of statements that were allegedly obtained through torture*." *Mainero*, 164 F.3d at 1207 (9th Cir. 1999)(Emphasis supplied). The evidence in *Mainero* included statements provided to agents of the presiding extradition court and numerous other independent witnesses,

hundreds of pages of investigative documents, and ballistic reports. *Id.* at 1207-1210.

This type of evidence independent of pernicious taint present in *Cornejo-Barretto* and *Mainero* is precisely what is absent in this case. *In re Extradition of Singh*, 170 F.Supp.2d at 1013 (Indian government's proof "is comprised almost entirely of alleged eye-witness statements summarized by Sharma" with no independent corroboration.) Here all that existed in each offense were identically tainted statements from a singular witness that not only lacked any indicia of reliability; the statements were suffocated with unreliability. Yet the extradition magistrate found some statements did not establish probable cause and other identical statements did. And this incongruency resulted, because without explanation, the extradition magistrate did not apply the omnipresent context in his examination of the statements that he credited. *See infra*. The extradition magistrate's arbitrariness that was the foundation of his irreconcilable probable cause findings conflicts with the guiding case law, and was wrongly affirmed by the panel. *See Cornejo-Barretto*, 218 F.3d at 1008; *Mainero*, 164 F.3d 1207-1210.

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4. CASE F.I.R. NO. 89: THE EXTRADITION COURT FOUND THAT THE CONSPIRACY AT ISSUE WAS DIRECTED AT THE GOVERNMENT COUNTERINSURGENTS, AND THEREFORE AN INFERENCE THAT MR. BARAPIND WAS GUILITY OF MURDERING THE CIVILIAN WIFE OF ONE OF THE TARGETS WAS WITHOUT ANY SUPPORT IN THE RECORD.

The issue in F.I.R. 89 is whether the allegations support the inference that Mr. Barapind murdered Kulwant Kaur. *Barapind*, 360 F.3d at 1070-71. The allegations are that he and three other alleged militant separatists entered the home of government counterinsurgents through their roof. *Id.* The parents and the wife of one of the counterinsurgents were also at the home. *Id.* Two of the counterinsurgents were asleep on the roof of the home with their parents, while the third counterinsurgent and his wife were in a different room. *Id.* Mr. Barapind allegedly shot and killed the two present counterinsurgents on the roof as they attempted to arm themselves. *Id.* Mr. Barapind then allegedly asked the mother of the counterinsurgents regarding the whereabouts of her son Karmjit Singh, the third counterinsurgent. *Id.* After the mother divulged he was in a different room, the three co-assailants allegedly went towards the identified room, while Mr. Barapind remained with the parents. *Id.* The three co-assailants then allegedly shot and killed Karmjit Singh and his wife Kulwant Kaur who was

also in the room, outside the presence of Mr. Barapind. *Id.* The assailants then left the home with the counterinsurgents' weapons. There is no allegation that Mr. Barapind harmed the parents. *Id*

Based on the mountain of evidence regarding the affiliations and related actions of the counterinsurgents, the extradition magistrate found that the murder of the three counterinsurgents qualified as political offenses and were excepted from extradition. *In re Extradition of Singh*, 170 F.Supp.2d at 1002-1004, 1035-36. He, nonetheless, found there was probable cause that Mr. Barapind was guilty of murdering Kulwant Kaur. *Id.* The panel affirmed the extradition magistrate's based on the finding that there was probable cause that Mr. Barapind murdered Kulwant Kaur. *Id.* The panel affirmed, although it understood that under Indian Penal Code § 108 the evidence had to demonstrate that Mr. Barapind shared the "same intention or knowledge as that of the abettor." The extradition court and the panel held that there was a "fair inference from the evidence in this context ... that Barapind shared the same criminal intent of his confederates." *Barapind*, 360 F.3d at 1071.

Consistent with the balance of its decision, the panel arrived at its conclusion without any explanation or citation to the evidence. *Id.* And that is because a "fair" examination of the record reveals, even accepting the

allegations at true, that there is no evidence that Mr. Barapind shared the criminal intent of the co-assailants. *In re Extradition of Singh*, 170 F.Supp. 2d at 1002-1004. The record establishes that the offense involved an attack by militants on counterinsurgents, not counterinsurgents and their family members, as evidenced by the fact the parents were not harmed. *Id.* at 1002-1004, 1035-37. That the counterinsurgents were the exclusive targets of the militants is further evidenced by the fact that after the militants killed the two counterinsurgents on the roof, they solely asked about the whereabouts of Karmjit Singh. *Id.*

Even in the context of extradition proceedings, there must be evidence to support the inference. *McNamara v. Henkel*, 226 U.S. 520, 525 (1920). And when that evidence is explained, an inference to the contrary is improper. *Id.* Neither the extradition court nor the panel cited any evidence that supported the inference. The inferences instead all support the contrary finding that, even accepting the allegation as true, Mr. Barapind did not share the intent to harm the wife of the counterinsurgent or any of their family members. Accordingly, the panel erred by affirming the extradition court's decision that there was probable cause of Mr. Barapind's guilt for the murder of Kulwant Kaur. *See Emami v. U.S. Dist. Ct*, 834 F.2d 1444, 1542 (9th Cir. 1987)(Evidence must establish prima facie case for alleged crime.)

C. THE PANEL'S DECISION REJECTS THE AMERICAN INCIDENCE TEST IN APPLYING THE POLITICAL OFFENSE EXCEPTION TO EXTRADITION AND IN ITS PLACE SANCTIONS UNCHECKED DISCRETION BY THE EXTRADITION MAGISTRATE.

1. APPLICABLE LEGAL FRAMEWORK & STANDARD OF REVIEW

Article VI of the Treaty bars the extradition of a relator for political offenses. Article VI, Treaty for the Mutual Extradition of Criminals between the United States of America and Great Britain ("Treaty"), Dec. 22, 1931, U.S.-Gr. Brit., TS. No 849 (1932).

Article VI bars extradition of a relator for pure and relative political offenses. *Quinn*, 783 F.2d at 793-94. Mr. Barapind invokes the exception for the latter, which requires that he demonstrate, the crime at issue was (1) committed during the course of an uprising, and (2) and the crime is incidental to the uprising. *See Id.* at 797. Because the extradition court concluded that there existed a political uprising in India at the time of the alleged crimes, only the application of the second prong of the exception is now at issue. *See Barapind*, 360 F.3d at 1075.

The facts underlying the offenses for which Mr. Barapind seeks protection under Article VI are not in dispute. And therefore, the extradition

magistrate's determination of whether the offense was incidental to the uprising is reviewed *de novo*. *Quinn*, 783 F.2d at 791.

2. THE PANEL ADOPTED A NEW STANDARD OF REVIEW FOR APPLICATION OF THE POLTICAL OFFENSE EXCEPTION THAT COUNTENACED THE EXTRADITION MAGISTRATE'S MISAPPLICATION OF THE *ORNELAS* FACTORS.

The panel correctly stated that the Court's standard of review of the extradition magistrate's application of the political offense exception was *de novo*: "the crucial determination – whether the crime was incidental to a political uprising – is a mixed question of law and fact that must be reviewed *de novo*." *Barapind*, 360 F.3d at 1073. But in reviewing the extradition court's findings the panel's decision reveals that the standard it applied was the more deferential abuse of discretion: "The determination as to what type of acts are incidental to the uprising is properly within the discretion of the magistrate." *Id.* at 1074. In so doing, the panel perfunctorily affirmed the extradition court's rejection of the prevailing American incidence test in evaluating whether Mr. Barapind was entitled to be excepted from extradition pursuant to Article VI.

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3. THE DENIAL OF ARTICLE VI'S PROTECTION TO MR. BARAPIND FOR F.I.R. NO. 34 IS BASED ON AN INCORRECT READING OF THE RECORD AND IS VOID OF APPLICATION OF ANY RULE OF LAW.

The consequence of the panel's reformulation of the incidence test and vesting its application completely in the discretion of the extradition magistrate is that it denied Mr. Barapind Article VI's exception to extradition for an offense that satisfied all the factors set forth in *Ornelas* to warrant its protection. The panel denied Mr. Barapind's Article VI protection "because the victims were agents of the State was not sufficient to demonstrate that the killings were politically motivated ... the fact that the ambush resulted in the assassination of government officials might suggest that the crime was of political nature," but was not determinative. *Barapind*, 360 F.3d at 1076.

The panel's suggestion that Mr. Barapind argued that the identity victims was determinative and that was the only evidence he presented in support of Article VI's protection is the result of incomprehensible reading of the record. Mr. Barapind, instead, established that *all* the *Ornelas* factors -- "the character of the foray, the mode of the attack, the persons killed or captured, and the kind of property taken" -- warranted his extradition being excepted under Article VI.

The character of the foray is that militant Sikh separatists, allegedly of the Khalistan Commando Force, ambushed armed agents of the State during the political uprising. *In re Extradition of Singh*, 170 F.Supp.2d at 1010-1011, 1032-1033(Explaining that victims of ambush in F.I.R. 34 were combatants in Punjab conflict). According to the United States Department of State and expert testimony at the hearing, the mode of the attack was identical to the violence that consumed the Punjab during the period of the attack. *See id.* As the panel and the extradition magistrate recognized, the identity of the victims of the attack also supported that the offense was incidental to the uprising. *Barapind*, 360 F.3d at 1076. And, the only "kind of property taken" were the guns and ammunition of the targets. *See In re Extradition of Singh*, 170 F.Supp.2d at 1010-1011.

Thus in F.I.R. 34 all the *Ornelas* factors were satisfied. Moreover, there was no evidence to "negative" Article IV's protection to Mr. Barapind. *See Ornelas*, 161 U.S. at 511(Once relator establishes facts triggering application of political offense, he is entitled to protection unless facts counsel against its application.); *see also Quinn*, 783 F.2d at 810(Same). The panel's justification for not affording Mr. Barapind the protection on the grounds that the only evidence supporting the application of the political offense exception ignores the applicability of the other

Ornelas factors to Mr. Barapind's case. When applied to F.I.R. 34, the *Ornelas* factors establish that Mr. Barapind is entitled to Article VI protection. *See id.*

4. THE DENIAL OF ARTICLE VI'S PROTECTION TO MR. BARAPIND FOR CASE F.I.R. NO. 89 BASED SOLELY ON THE FACT THAT ONE OF THE VICTIMS WAS A CIVILIAN IS UNPRECEDENTED IN LIGHT OF THE FACT THAT IT IGNORES THAT MR. BARAPIND IS NOT ALLEGED TO HAVE HARMED MS. KAUR NOR INTENDED TO HAVE HARMED MS. KAUR.

Although the panel's decision held that with regard to the application of the political offense exception, the identity of the victims was not determinative for F.I.R. 34, it was for the death of Kulwant Kaur in F.I.R. 89. *Barapind*, 360 F.3d at 1075-76. The panel's decision is the first to conclude that the identity of victim alone, in an otherwise political offense, strips a relator of Article VI protection. *See Quinn*, 783 F.2d at 804-806 (Civilian status of victims standing alone does not bar application of political offense exception); *see also Eain v. Wilkes*, 641 F.2d 504, 522-23 (7th Cir. 1981)(Same); *Ornelas*, 161 U.S. at 692 (Same).

Because the offense allegedly involved an attack by Sikh militants against armed government counterinsurgents, the extradition magistrate held that Mr. Barapind could not be extradited for their murder. *In re Extradition of Singh*, 170 F.Supp.2d at 1035-37. The magistrate,

however, held that Article VI's protection did not extend to the death of Kulwant Kaur, the wife of the counterinsurgent allegedly killed during the course of the same offense by Mr. Barapind's co-assailants. *Id.* at 1036-37.

The extradition court withheld Article VI's protection from Mr. Barapind for the death of Kulwant Kaur because it equated it to the targeting of a civilian. *Id.* at 1036-37. The record establishes, however, based on the extradition magistrate's own findings that the target of the offense were the counterinsurgents. *Id.* at 1002-1004. Additionally, and far more importantly, the evidence is that Mr. Barapind himself is alleged to have only targeted the counterinsurgents. *Id.* Mr. Barapind is alleged to have only shot two individuals, both counterinsurgents. *Id.* Mr. Barapind is then alleged to have only asked the parents about the whereabouts of their son Karmjit Singh, the third counterinsurgent, and no one else. *Id.* Mr. Barapind is then alleged to have remained with the parents while the co-assailants searched out, and outside Mr. Barapind presence, killed Karmjit Singh, and along with him, his wife. *Id.*

The fact that F.I.R. 89 was not an offense in which Mr. Barapind targeted civilians is conclusively established by the identity of the persons whom he attacked and those whom he spared. Mr. Barapind is alleged to have killed two counterinsurgents and asked about a third. *Id.*

When allegedly presented with the opportunity to target civilians, namely the counterinsurgents' parents, he did not harm them. *Id.* Therefore, F.I.R. 89 is not an offense where Mr. Barapind can be alleged to have targeted civilians. The analogies to cases involving bombings targeting civilians are inappropriate. *Eain v. Wilkes*, 641 F.2d 504 (7th Cir. 1981)(Political offense exception denied where relator exploded bomb in market); *Quinn*, 783 F.2d 776 (9th Cir. 1986)(Political offense exception denied where relator engaged in international terrorism and bombed bus carrying civilians); *Ahmed v. Wigen*, 910 F.2d 1063 (2nd Cir. 1990)(Political offence exception denied where relator engaged in international terrorism and bombed bus carrying civilians).

Indeed, if adopted, the panel's approach to F.I.R. 89 adopts a far more restrictive approach than the Seventh Circuit's in *Eain v. Wilkes*, 641 F.2d 504 (7th Cir. 1981), that the panel cited with approval. *See Eain v. Wilkes*, 641 F.2d at 521-23. According to the Seventh Circuit in *Eain*, the civilian status is one but not the only factor to be considered under the *Ornelas* incidence test, and under that test, the political offense exception does not extend to extend to alleged politically motivated "random ...bombing directed at civilian population [because it] is not incidental to political upheaval." *See id.* The panel's decision, however, goes beyond

Eain, holding that the civilian status of one of the victims automatically precludes the application of the exception irrespective of whether the civilian was the intended target of the offense. According to the panel, this is so even if the unrebutted evidence is that the relator himself was not involved in harming the civilian victim; and evidenced intent only to target combatants by overtly, through his words and actions, sparing civilians. The panel thus implies that there is no difference between the actions in Iraq of United States soldiers who are involved in combat where civilians die and coordinators of suicide bombers who target civilians. The governing extradition law fortunately is not so devoid of thoughtfulness that it does not distinguish between the two. *See e.g. Ornelas*, 161 U.S. at 692(Civilian status of victim one factor, but only factor in application of political offense exception.); *Quinn v. Robinson*, 783 F.2d 776 (9th Cir. 1986)(International terrorism targeting civilians presents unique problem for American incidence test); *see also Eain v. Wilkes*, 641 F.2d 504 (7th Cir. 1981). Since the panel departed from this governing law, panel rehearing is necessary. *See* Fed. R. App. P. 35(a)(1).

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CONCLUSION

For the reasons set forth above, pursuant to Federal Rules of Appellate Procedure 35, petitioner Kulvir Singh Barapind seeks rehearing *en banc* of the panel's decision in *Barapind v. Enomoto*, 360 F.3d 1061 (9th Cir. 2004).

Dated: April 26, 2004
San Francisco, Ca

Respectfully submitted,

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Revised FORM 8

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PURSUANT TO CIRCUIT RULE 32-1

Case No. 02-16944

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BARAPIND v. ENOMOTO
02-16944

PROOF OF SERVICE

I, Jagdip Singh Sekhon, hereby declare as follows:

I am over the age of eighteen and I am presently employed at 529 Commercial Street, Third Floor, in the City and County of San Francisco.

On, April 26, 2004, I personally served the following through the United States Postal Service on Stanley A. Boone, AUSA, Room 3654, 1130 "O" Street, Fresno, Ca 93721:

Petition for Rehearing

I, Jagdip Singh Sekhon, declare under the penalty of perjury that the above is true and correct to the best of my knowledge.

Executed on April 26, 2004, in San Francisco, California.

Jagdip Singh Sekhon

C.A. NO. 02-16944

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KULVIR SINGH BARAPIND, Petitioner-Appellant, v. ANTONIO C. AMADOR, United States Marshal for Eastern District of California Respondent-Appellee.	D.C. NO. CV. 01-6215 OWW/SMS (E.D. Calif., Fresno)

Appeal from the United States District Court
for the Eastern District of California

APPELLEE'S OPPOSITION TO PETITION FOR REHEARING EN BANC

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IN THE UNITED STATES COURT OF APPEALS

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KULVIR SINGH BARAPIND, Petitioner-Appellant, v. ANTONIO C. AMADOR,[1] United States Marshal for Eastern District of California Respondent-Appellee.	D.C. NO. CV. 01-6215 OWW/SMS (E.D. Calif., Fresno) OPPOSITION TO PETITION FOR REHEARING EN BANC

INTRODUCTION

On March 10, 2004, this Court affirmed the district court's decision to order the extradition of Kulvir Singh Barapind ("Barapind") to India for crimes of (1) the murder of Kulwant Kaur as charged in FIR 89;[2] (2) the murders of Kulwant Singh, Aman Nath

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[1] Pursuant to Federal Rule of Appellate Procedure 43(c)(2), U.S. Marshal Antonio C. Amador was automatically substituted in for Jerry C. Enomoto, as United States Marshal for the Eastern District of California, upon his confirmation by the Senate on September 20, 2002.

[2] "FIR" refers to First Information Report which is prepared by a Head Constable or other authorized officer in police station having territorial jurisdiction over the offense. The FIR sets forth facts regarding the case and the specific violation of the Indian Penal Code and other statutes. Barapind, 360 F.3d at 1065. For a general discussions of Indian criminal process see Barapind, 360 F.3d 1065-66 and Appellant's Opening

Kanigo, Soda Ram and Jasbir Ram as charged in FIR 34 and (3) the murder of Sahib Singh (aka Sahbi) and attempted murder of Makham Ram as charged in FIR 100. Barapind v. Enomoto, 360 F.3d 1061.

In his appeal, Barapind argued that the district court erred in its probable cause finding associated with these crimes and, to the extent that probable cause did exist, the district court should have found that such conduct fell within the purview of the political offense exception. In rejecting these contentions, this Court held that district court did not err in its probable cause determination because there was "ample competent evidence in the record" based upon a thorough review by the district court of both the government's and Barapind's evidence and its meticulous weighing of the evidence associated with each separate offense. Barapind, 360 F.3d at 1070. Further, this Court held that the fact that Barapind presented evidence of torture, forced confessions and unreliable evidence as to some FIR's did not negate probable cause as to the entire submission of evidence by India because the district court, in its detailed analysis, accepted some of this evidence in making a finding of insufficient probable cause as to three of the eleven offenses.[3] Id. at 1073. Lastly, this Court upheld the district court's determination that

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Brief at pgs. 8-9.

[3] Those offenses were FIR's 52, 87 and 220. Barapind, 360 F.3d at 1072-73.

the political offense exception did not apply to the offenses for which extradition was ordered. Id. at 1075-1076.

On April 30, 2004, Barapind filed a Petition for Rehearing En Banc. On May 21, 2004, the Court directed the United States to file a response to the petition.

ARGUMENT

EN BANC CONSIDERATION IS NOT APPROPRIATE BECAUSE THIS IS NEITHER A CASE WHERE CONSIDERATION BY THE FULL COURT IS NECESSARY TO MAINTAIN UNIFORMITY OF ITS DECISIONS NOR A CASE INVOLVING A QUESTION OF EXCEPTIONAL IMPORTANCE

Barapind argues that rehearing en banc should be granted in this case because it is a case of "exceptional importance" which, as result of this panel's opinion (1) lowers the standard by which probable cause is determinated in an extradion case and (2) applies a new standard by which a court determines whether the political offense exception applies to one's conduct. Petition for Rehearing at 6-7, 25-26 (hereinafter, "Petition"). Barapind's contentions are simply not accurate. This is neither a case of exceptional importance, nor a case which conflicts in any way with any previous decisions of this Court. Thus, this case does not meet the criteria for en banc consideration.

Rule 35 of the Federal Rules of Appellate Procedure provides the following guidelines on when an en banc hearing is appropriate:

> Such a hearing or rehearing is not favored and ordinarily will not be ordered except (1) when

> consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. (Emphasis added.)

Fed. R. App. P. 35(a). This case does not meet those criteria.

There were two parts to the Court's holding in this appeal. First, the Court upheld the district court's finding of probable cause on three offenses[4] and, second, the Court upheld a finding that these offense did not fall within the purview of the political offense exception. While petitioner asserts that this court reduced the standard of probable cause and removed an essential test in the political offense exception, such contentions are entirely without merit. His argument in support of such assertions is merely his previous arguments which was

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[4] The district court found sufficient probable cause in eight of the eleven charges for which the government of India sought extradition in September 1997. With respect to those eight charges the district court found that as to five of those offenses the political offense exception applied and hence Barapind could not be extradited. Therefore, it found the defendant extraditable on only three offenses. While the panel found fault with the government's failure to challenge the district court's adverse findings and conclusions, the government was simply without a remedy to do so. See Barapind, 360 F.3d at 1067. Under the law of extradition, neither party has a right to appeal an order for extradition and the only available remedy to challenge an extradition court's findings and conclusions was by way of a writ of habeas corpus found in 28 U.S.C. § 2241. See Quinn v. Robinson, 783 F.2d 776, 786 n. 3 (9th Cir. 1986). Such a remedy is only available to the petitioner held in custody by the government, not the government itself. The government's only available remedy is to seek to extradite him again on those remaining eight charges. See Hooker v. Klein, 573 F.2d 1360, 1365-66 (9th Cir. 1978). Such a proceeding would further delay these proceedings, ultimately, the trial in India on the merits.

ultimately rejected by this Court and the district court. The only difference is that the arguments are now more emotionally charged. Nothing that this panel did changed the law with regard to extradition in this circuit.[5] To the contrary, acceptance of petitioner's argument would change the law of this circuit and of extradition law in general. To adopt petitioner's position by granting en banc review is akin to applying a de novo standard of review by an appellate court of an extradition court's probable cause finding, despite a thorough analysis and weighing of evidence by a lower court. Such has never been the law in this circuit or elsewhere. Further, acceptance of petitioner's position on the political offense exception would be contrary to extradition law by allowing the subjective beliefs of a petitioner to determine whether his or her actions fall within the exception.

Lastly, this case is of no exceptional importance as these issues presented in this case are issues which regularly addressed in almost all extradition cases on appellate review. Since no new law is created by this panel's decision, nothing exceptional

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[5] Petitioner attempts to argue that the panel changed the law with regard to the "political offense" exception by rejecting portions of Quinn v. Robinson, 783 F.2d 776 (9th Cir. 1986) upon which the petitioner heavily relied upon at the district and appellate court levels. However, since a large majority of the political offense discussion in Quinn was merely dicta, such dicta was never the law of this circuit or elsewhere, so its rejection by this panel changed no law. Barapind, 360 F.3d at 1074, n. 2.

exists about the case. Accordingly, this Court should reject en banc review.

A. Petitioner's argument on the Panel's probable cause determination is merely an attempt to rehash the evidence and have this Court adopt a de novo review standard

Barapind contends that en banc review is appropriate because this Court applied a "lower standard" than that of probable cause. Petition at 6-8. In fact, the panel applied the correct legal standard for an appellate court reviewing a probable cause determination made by an extradition court.

The Supreme Court stated in Collins v. Loisel, that "[t]he function of the committing magistrate is to determine whether there is competent evidence to justify holding the accused to await trial, and not to determine whether evidence is sufficient to justify a conviction." 259 U.S. 309, 316; see also United States ex rel. Sakaguchi v. Kaulukukui, 520 F.2d 726, 730-31 (9th Cir. 1975) (magistrate's function is to determine whether there is "any" evidence establishing reasonable or probable cause); Merino v. United States Marshal, 326 F.2d 5, 11 (9th Cir. 1963), cert. denied, 377 U.S. 997 (1964); See Hooker v. Klein, 573 F.2d 1360, 1365 (9th Cir. 1978)("Habeas corpus cannot take the place of a writ of error and 'is not a means for rehearing what the magistrate already has decided.'" (quoting Fernandez v. Phillips, 268 U.S. 311, 312 (1925)); Quinn v. Robinson, 783 F.2d 776, 790

(9th Cir.), cert. denied, 479 U.S. 882 (1986); Mainero v. Gregg, 164 F.3d 1199, 1205 (9th Cir. 1999);[6] United States v. Wiebe, 733 F.2d 549, 553 (8th Cir. 1984)("[Q]uestions regarding the weight and sufficiency of the evidence presented at an extradition hearing simply are not reviewable in habeas corpus proceedings."); Garcia-Guillern v. United States, 450 F.2d 1189, 1192 (5th Cir. 1971), cert. denied, 405 U.S. 989 (1972). Quinn v. Robinson, 783 F.2d 776, 792 (9th Cir. 1986), cert. denied, 479 U.S. 882 (1986)(

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[6] Petitioner attempts to argue that the panel inappropriately applied the cases of Mainero and Cornejo-Barreto v. Seifert, 218 F.3d 1004 (9th Cir. 2000) to his case. Petition at 12-21. In fact, the panel correctly analyzed and applied both cases to his circumstances. Here, the district court did not find fabrication or other evidence obtained through torture, but determined that such issues are best left for a trial on the merits. It should not be overlooked that when the court found compelling conflicting evidence, it rejected the probable cause finding. Barapind, 360 F.3d at 1073. Further, neither case held that such fabrication, recantation and/or torture evidence must be stricken when making a probable cause determination. In Cornejo-Barreto, the extradition court simply did not consider such evidence obtained by torture. 218 F.3d at 1008. It never held that a court must not consider such evidence. In Mainero, just as in Barapind, the court did not address the issue of recantation evidence because the extradition court considered the evidence presented by the petitioner. Mainero, 164 F.3d at 1207, n. 7. It also did not hold that evidence presented by the government which is subsequently recanted cannot or should not be considered in the context of a probable cause determination. Petitioner cites no case by which an extradition court must strike such evidence. In fact, while Mainero is silent on the issue its analysis suggests the opposite: that such evidence can be considered and it is in the sound discretion of the extradition court as to how much wight to give that evidence. That is exactly what a trial is all about and what an extradition hearing is not. Accordingly, the panel did not incorrectly apply Mainer or Cornjeo-Barreto.

"Factual determinations by a magistrate judge in an extradition proceeding are reviewed for clear error."); Caplan v. Vokes, 649 F.2d 1336 (9th Cir. 1981)(clearly erroneous standard applied to factual findings of district court that had both ordered extradition and denied petition for habeas corpus). A probable cause finding "must be upheld if there is any competent evidence in the record to support it." Mainero, 164 F.3d at 1205-1206; Quinn, 783 F.2d at 815 ("The credibility of witnesses and the weight to be accorded their testimony is solely within the province of the extradition magistrate.") and Collins v. Loisel, 259 U.S. 309, 317 (1922). Further, a determination of probable cause in an extradition proceeding may rest entirely upon hearsay and unsworn statements. Collins, 259 U.S. at 317 ("unsworn statements of absent witnesses may be acted on by the committing magistrate").[7]

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[7] Accord United States v. Zananzanian, 729 F.2d 624, 627 (9th Cir. 1984); Emami v. United States District Court, 834 F.2d 1444, 1451 (9th Cir. 1987) ("[w]ith regard to the admissibility of evidence, the general United States extradition law requires only that the evidence submitted be properly authenticated"); In the Matter of Assarsson, 635 F.2d 1237, 1245-46 (7th Cir. 1980) ("[t]he admissibility of evidence in an extradition case is governed by federal law," citing Section 3190's authentication requirement); In re Extradition of Lahoria, 932 F. Supp. 802, 812 (N.D. Tex. 1996) (rejecting a defense proffered document as having "little weight, because, unlike [the witness's] confessional statement, it lacks appropriate authentication"); Castro Bobadilla v. Reno, 826 F.Supp. 1428, 1433 (S.D. Fla. 1993), aff'd 28 F.3d 116 (11th Cir. 1994) ("Competent legal evidence is that which is properly admissible at the extradition hearing").

As noted, all the documents received from India, and admitted at the extradition hearing,[8] were properly certified and hence authenticated in accordance with 18 U.S.C. § 3190 because they were certified by a consular officer of the United States in India. S.E.R. 1, 3 and 4; E.R. 15, pg. 1; E.R. 2 and E.R. 12; see also Zanazanian v. United States, 729 F.2d 624, 627 (9th Cir. 1984)("[n]either the applicable treaty nor United States law requires that evidence offered for extradition purposes be made under oath."). The treaty between the United States and India allows for admission of the evidence solely under Section 3190. See Article 8. Further, these certified documents may form the exclusive evidentiary foundation to support extradition. See Oen Yin-Choy v. Robinson, 858 F.2d 1400, 1406 (9th Cir. 1988), cert. denied, 490 U.S. 1106 (1989) (evidence was competent if authenticated in accordance with statute and treaty, and reliability challenges that did not bear on authentication must necessarily fail).

Here, the district judge found, after a thorough analysis of the record, that, based upon the documents submitted and admitted into evidence, probable cause existed for the offenses for which

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[8] S.E.R. 1, 2, 3 and 4. "S.E.R." refers to Appellee's Supplemental Excerpts of Record filed on July 1, 2003, with Appellee's Opening Brief. "E.R." refers to Appellant's Excerpts of Record filed with Appellant's Opening Brief on or about April 10, 2003.

extradition was ordered. E.R. 5, pgs. 85, 88-89 and 95. In each case, the district judge carefully considered the evidence presented by the government of India and the evidence presented by the petitioner in making his probable cause determination. E.R. 5, pgs. 39-46, 55-57, 84-89 and 93-95; S.E.R. 1 and 4; E.R. 12 and 15.[9] It is clear from an examination of all three charges

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[9] Most of the evidence submitted by petitioner to refute the charges set forth in the extradition request was based upon translated affidavits. Those affidavits were not turned over to the government until the eve of the extradition hearing. See E.R. 6, 8, 9, 10 and 11 (Translations certified on January 30, 2001). The evidence upon which the government relied was turned over to the petitioner shortly after he made his initial appearance in the Eastern District of California on the extradition complaint. C.R. 1, 2 and 3. Only the supplemental request was not turned over to petitioner at that time because that document was not yet in existence. S.E.R. 3 and 4; E.R. 12. The government argued the weight of such evidence. Similar arguments made by the petitioner could be made here: that the petitioner provided such affidavits on an untimely basis in order to foreclose the government from properly impeaching and cross-examining those statements. While the panel criticized the government for making such a minimal efforts to refute such evidence (Barapind, 360 F.3d at 1067), this evidence was only recently received and further continuance would have delayed the proceedings even further. Lastly, A court cannot possibly determine that the affidavits offered by petitioner are any more reliable than the government's evidence. Attorney Navjiran Singh, who took the statements from witnesses, did not independently contact the witnesses himself. Instead, petitioner's brother - who did not testify at the extradition hearing and did not submit an affidavit explaining his actions - solicited the witnesses. It is impossible to discount the possibility that they were bribed, threatened, or otherwise influenced, and one does not know if other witnesses were contacted and declined to recant. While the government did not challenge the good faith of the attorney, it does question his assumption that his conversations with the witnesses guaranteed that they were not threatened or influenced. Again, this fact is something which a trial on the merits must address, not an

that the finding of probable cause was correctly made. It was due to this thorough analysis by the district court that caused this panel to hold that ample evidence existed to support a probable cause finding. Barapind, 360 F.3d at 1070, 1072. The panel performed its appellate function in determining whether there was evidence of probable cause. It did not attempt to re-weigh the evidence nor come to its own conclusions as to the how the evidence could be construed or rejected, but determined whether evidence existed in the record to establish probable cause. This is the appropriate function of an appellate court in such a proceeding. To decide otherwise, especially after such a careful and thorough analysis by an extradition court, would be to adopt a de novo review standard. Such a standard has never been the law when it comes to a probable cause determination on appeal.

Also, as correctly noted by this Court, while the issues raised by Barapind may have some merit, their merit must be determined at a trial, not at an extradition hearing held in the surrendering state. To hold otherwise would utterly undermine the treaty obligations and would require the requesting state to conduct a "mini trial" on the merits. See United States v. Kin Hong, 110 F.3d 103, 110 (1st Cir. 1997)(treaties are to be liberally construed in favor of enforcement because they are "in

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extradition hearing.

the interest of justice and friendly international relationships.") (quoting Factor v. Laubenheimer, 290 U.S. 276, 298 (1933); Matter of Sindona, 450 F.Supp. 672, 685 (S.D.N.Y.1978), aff'd, 619 F.2d 167 (2nd Cir. 1980) ("extraditee cannot be allowed to turn the extradition hearing into a full trial on the merits."). Therefore, this panel's decision on this issue does not justify en banc review.

B. Petitioner attempts to resurrect Quinn v. Robinson's dicta in order to allow a blanket authorization of the Political Offense Exception

Lastly, petitioner contends that this panel applied a new standard by which an extradition court applies the political offense exception. Petition at 25-32. He argues that this Court abrogated the American incidence test and that he should be given, in essence, blanket authorization for his crimes despite a lack of showing that each individual crime fell with the exception. Id. His position is based primarily on the dicta found in Quinn v. Robinson, 783 F.2d 776 (9th Cir. 1986). Id. at 25, 26, 28-29, 31-32. As correctly noted by the panel, the Quinn analysis is misplaced and adopts an uncivilized standard in its application. Barapind, 360 F.3d at 1075. As noted previously, since the language found in Quinn was dicta and hence not law of this circuit, the panel did not create new law but adopted an analysis based upon other circuits as to the application of the political offense exception. See also Appellee's Opening Brief filed July

1, 2003 at pgs. 34-37. The panel noted that Quinn's test allowed a political revolutionary the license to kill innocent civilians with impunity. Barapind, 360 F.3d at 1076. This analysis is particularly enlightening when compared with the insufficient evidence presented by Barapind that his crimes found in FIR's 34 and 89 afforded him the protection under the political offense exception.[10]

In support of the panel's holding, no case has ever allowed a political offense exception for wanton crimes directed at innocent civilians and yet, Quinn's ultimate application can conceivably obtain this inappropriate result. Two circuits have directly held that attacks directed at non-combatant civilian targets cannot satisfy this prong of the "incidence" test. Ahmad v. Wigen, 910 F.2d 1063, 1066 (2nd Cir. 1990) (a PLO activist's "attack on a commercial bus carrying civilian passengers on a regular route is not a political offense.") and Eain v. Wilkes, 641 F.2d 504, 518 (7th Cir. 1981);[11] see also In the Matter of Extradition of

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[10] Barapind does not contest the district court's finding that FIR 100 was not subject to the political offense exception. Barapind, 360 F.3d at 1076.

[11] Eain involved the planting of a bomb in an Israeli city, resulting in the death of two civilians. While is was sufficiently connected to the PLO's objective of overthrowing the Government of Israel and driving out Israel's population, the offense had an impact on the citizenry, but not directly upon the government, and could not qualify for the political offense exception.

Marzook, 924 F. Supp. 565, 577 (S.D.N.Y. 1996); Extradition of Demjanjuk, 612 F. Supp. 544, 570 (N.D. Ohio 1985) ("The civilian status of the victims is also significant because the United States does not regard the indiscriminate use of violence against civilians as a political offense"). Ahmad, Eain, Marzook, and Demjanjuk thus show that the allowance the courts make for violent crimes in the context of a civil war or uprising is inapplicable to shield the knowing effort to kill or injure unarmed, uninvolved, innocent civilians who are non-combatants in the struggle. See also Ornelas v. Ruiz, 161 U.S. 502 (1895).

The thorough analysis conducted by the district court, and affirmed by this court, is amply supported by the record. In FIR 89, nothing was submitted by Barapind to show that Kulwant Kaur was anything other than an innocent victim. Barapind, 360 F.3d at 1076. With regard to FIR 34, the fact that the victims were a former government official and his police body guards does not, in and of itself, justify or meet the preponderance of evidence standard by which the political exception applies. Id. Such is not the law nor should it be as it would simply allow for the killing and/or violence against innocent individuals. Again, as with probable cause, the petitioner attempts to re-weigh evidence in order to come up with a finding that the political offense exception applies to his conduct merely because he was a member of the uprising. His analysis does not matter what the crimes

necessarily are or who the victims are, only that an uprising is occurring and petitioner is committing his crimes during that uprising and as part of that uprising. To adopt such a position is to adopt an rule of law based upon a petitioner's subjective mind, about which only a petitioner is competent to testify. This would result in a blanket authorization to commit wanton crimes against anyone regardless of a victims status, as all crimes are against crimes against the state. Accordingly, en banc review must be denied.

CONCLUSION

As this panel noted, Justice Holmes in Fernandez v. Phillips, 268 U.S. 311, 312 (1925) stated that a writ of habeas corpus in an extradition case "is not a means for rehearing what a magistrate already has decided." Barapind, 360 F3.d at 1068. Similarly, this petition should also not be a basis to rehear or reconsider the panel's decision en banc when such a decision is based upon prior extradition law, is not necessary to secure or maintain uniformity of this circuit's decisions nor does it involve a question of exceptional importance. Fed.R.App.P. 35(a)(1) and (2). Accordingly, the petition of en banc review must be denied.

McGREGOR W. SCOTT
United States Attorney

DATED:

By
STANLEY A. BOONE
Assistant U.S. Attorney

STATEMENT OF RELATED CASES

As required by Rule 28-2.6 of the Rules of the United States Court of Appeals for the Ninth Circuit, the United States of America, appellee herein, is aware of the following related cases:

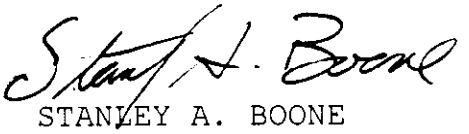
1. Kulvir Singh Barapind v. Reno,
   C.A. 99-16668
   225 F.2d 1100 (9th Cir. 2000)

2. Kulvir Singh Barapind v. Rodgers,
   C.A. 96-55541

DATED: June 4, 2004

Respectfully submitted,

McGREGOR W. SCOTT
United States Attorney

By 
STANLEY A. BOONE
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CERTIFICATE OF COMPLIANCE

Pursuant to Ninth Circuit Rule 32(e)(4), I certify that the Brief for Appellee is monospaced, has 10.5 or less characters per inch, and contains 4457 words.

6/4/04
Date

STANLEY A. BOONE
Assistant United States Attorney

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is an employee in the Office of the United States Attorney for the Eastern District of California and is a person of such age and discretion to be competent to serve papers.

That on June 4, 2004, she served a copy of the Brief for Appellee by placing said copy in a postpaid envelope addressed to the person(s) hereinafter named, at the place(s) and address(es) stated below, which is/are the last known address(es), and by depositing said envelope and contents in the United States Mail at Fresno, California.

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